No. 01-1368

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IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Petitioners,

—v.—

WILLIAM HIBBS and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WOMEN'S HISTORY SCHOLARS ALICE KESSLER-HARRIS, LINDA KERBER *ET AL.*, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are historians and scholars who have studied and written extensively on United States women's history. *See* Appendix A. Because this case raises issues concerning the history of state-sponsored sex discrimination, *Amici* have an interest in bringing the historical record to the Court's attention.

SUMMARY OF ARGUMENT

Congress enacted the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-54 ("FMLA"), to prevent and remedy various forms of sex discrimination in employment stemming from the pervasive and intractable stereotype that family care is primarily women's work and is women's primary responsibility. Congress recognized that this stereotype has long caused employers, including state employers, to make family leave available, if at all, to women and not men, to refuse to hire or promote women, to fire or demote women, and otherwise to discriminate against women in employment and against men in family care benefits.

There is substantial evidence of unconstitutional state-sponsored sex discrimination with respect to the very subjects addressed by the FMLA. First, states discriminated based on sex in the employment leave they made available to their employees. They did so by restricting the availability of leave to women either explicitly in their policies or on an *ad hoc* basis by granting discretionary leave in a discriminatory manner. States also discriminated against female employees because they had taken, or state employers expected they would take, leave. States started taking steps to halt this pervasive discrimination

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[1] The parties have consented to the filing of this *Amici Curiae* brief, as evidenced by letters of consent filed with the Clerk. *Amici* are not related in any way to any party in this case, and no person or entity other than *Amici* and their counsel has authored any part of, or made any monetary contribution to the preparation of, this brief.

only in response to congressional consideration of the FMLA. Second, from the beginning of the republic until recently, states discriminated based on sex through countless laws restricting women's employment opportunities. Not only were those state laws grounded in the sex-role stereotypes addressed by the FMLA, but they also ensured, through the coercive power of the states, that women would remain primarily family caretakers. In each of these ways, the states played a substantial role in creating the need for the FMLA.

The congressional, judicial, and statutory records are replete with evidence of each of these forms of state discrimination. All of this evidence is relevant to the Court's inquiry as to whether the FMLA is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to remedy sex discrimination. Congress acted under the backdrop of a long history of sex discrimination, a history which this Court has recognized entitles sex classifications to heightened scrutiny.

ARGUMENT

I. THE COURT SHOULD CONSIDER ALL EVIDENCE OF UNCONSTITUTIONAL STATE CONDUCT JUSTIFYING THE FMLA

In order to determine whether Congress validly exercised its Section 5 power to abrogate the states' sovereign immunity, this Court has first identified "the targeted constitutional wrong," *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646 (1999), and then considered the existence of "evidence of widespread and unconstitutional . . . discrimination by the States," *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000), sufficient to justify remedial congressional action. The constitutional wrong targeted by the FMLA is sex discrimination, including unconstitutional discrimination by the states, that restricted women's employment opportu-

nities as well as men's opportunities to take family leave based on the impermissible assumption that women and not men are responsible for family care. The stated purposes of the FMLA include "to promote the goal of equal employment opportunity for women and men," 29 U.S.C. § 2601(b)(5), and, "consistent with the Equal Protection Clause of the Fourteenth Amendment," to "minimize[ ] the potential for employment discrimination on the basis of sex by ensuring that [family and medical] leave is available . . . on a gender-neutral basis." *Id.* § 2601(b)(4). In enacting the FMLA, therefore, Congress was responding to the fact that employers, including states, discriminated based on sex by failing to make employment leave available on a gender-neutral basis. Congress was also aware of the long history of discriminatory state laws and practices that relegated women to the role of family caretakers and secondary workforce participants.

The Court should consider the full range of the overwhelming evidence of unconstitutional state action that supports remedial congressional action in the FMLA. This evidence is in the congressional, judicial, and statutory records and shows that states discriminated both in granting employment leave and in restricting women's workplace participation. While the Court has examined legislative records as "[o]ne means" of determining whether Section 5 legislation addresses unconstitutional state action, *Kimel*, 528 U.S. at 88, it has also recognized that "lack of support [in the legislative history] is not determinative of the § 5 inquiry," *id.* at 91; *Florida Prepaid*, 527 U.S. at 646 (same). Rather, as Justices Kennedy and O'Connor have observed, the existence of unconstitutional state action may also be found in "confirming judicial documentation." *Board of Trustees v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring). What is important is the wrong Congress sought to remedy, not the extent to which Congress documented the wrong.

When Congress acts to remedy discrimination based on a classification subject to heightened scrutiny under the Equal Protection Clause, it has greater leeway in making findings because the Court's heightened scrutiny doctrine already reflects judicial recognition that there has been "a history of purposeful unequal treatment" based on sex. *Kimel*, 528 U.S. at 83. That history is also confirmed in the statute books. *See Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) ("our statute books gradually became laden with gross, stereotyped distinctions between the sexes"). Indeed, the judicial and statutory records, in addition to the congressional record, reflect a history of state-sponsored sex discrimination causing and contributing to the very injury Congress addressed in the FMLA. The same history of state-sponsored sex discrimination that leads the Court skeptically to scrutinize sex-based classifications supports Congress's efforts to enact remedial legislation. Congress and this Court are entitled to rely on that history. As the Ninth Circuit aptly said, "when our nation's judicial history already documents unconstitutional discrimination against the class at issue, there is no need for Congress, separately and redundantly, to provide detailed findings of such discrimination in order to exercise its Fourteenth Amendment powers." *Hibbs v. Department of Human Res.*, 273 F.3d 844, 861 (9th Cir. 2001). Accordingly, the judicial and state statutory histories should be considered along with the legislative history in any review of the FMLA.

II. BEFORE THE FMLA, STATES UNCONSTITUTIONALLY DISCRIMINATED IN FAMILY LEAVE FOR STATE EMPLOYEES

The states historically discriminated in the family leave afforded to their own employees in a number of respects: (1) through family leave policies that restricted leave to women only, (2) through discretionary leave policies applied in a discriminatory manner resulting in leave

being available to female employees but denied to male employees, and (3) through the complete absence of leave policies that led to disparate treatment of female employees. These state responses to employees' family care responsibilities reinforced a social order whereby women are the primary family caregivers and men the breadwinners.

Congress recognized that when family leave is available to women and not men, or when it is not available at all, employers discriminate against women in hiring and promotions on the assumption that they are less committed to their jobs than men. *See, e.g.*, H.R. Rep. No. 103-8(I), at 29 (1993) ("A law providing special protection to women . . . , in addition to being inequitable, runs the risk of causing discriminatory treatment.").[2] Such policies also affect family choices by providing incentives for women and not men to undertake family care responsibilities. *See, e.g.*, H.R. Rep. No. 103-8(II), at 14 (1993) ("While women have historically assumed primary responsibility for family caretaking, a policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping and improperly impedes the ability of men to share greater responsibilities in providing immediate physical and emotional

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[2] *See also Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor & Human Res., Part 2*, 100th Cong. 170 (1987) ("*1987 Hearings*") (testimony of Peggy Montes) ("Job opportunities for [women with families] are limited, and they often miss pay increases and promotions. The lack of uniform parental and medical leave policies in the work place has created an environment where discrimination is rampant."); 138 Cong. Rec. H8,226-27 (1992) (remarks of Rep. Hayes) ("Too often women experience the nightmare of going in to their employer with the news that they are pregnant. Although they are valued employees, up to the moment they become pregnant, suddenly they find themselves unwanted.").

care for their families.").[3] Discriminatory family leave policies thus result in state-sanctioned relegation of women to the status of secondary employees. It is these forms of unconstitutional state-sponsored sex discrimination in family leave policies that Congress targeted in the FMLA.

A. State Policies Explicitly Accorded Different Leave To Women And Men

During the eight years between the introduction of the first federal family leave bill in 1985 (the Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985)) and the passage of the FMLA, Congress amassed substantial evidence of sex discrimination as a result of state employment policies that accorded family leave differently to women and men.

The congressional record references studies of public sector family leave policies conducted by the Yale Bush Center, which surveyed all 50 states in the mid-1980s. *See, e.g., 1986 Hearings* at 29-30 (testimony of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project); *The Parental Leave Crisis: Toward a National Policy* (Edward F. Zigler & Meryl Frank eds.,

[3] *See also Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Rel. and the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong. 101 n.2 (1986) ("*1986 Hearings*") (statement of Women's Legal Defense Fund) ("[B]ecause of sex discrimination against men, some working fathers may find it more difficult than their female counterparts to be permitted to accommodate family responsibilities without suffering adverse employment consequences."); *Family Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Labor-Mgmt. Rel. and the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 100th Cong., 1st Sess. 235 (1987) (testimony of Donna Lenhoff) (employment policies "continue to operate as if women's role is to stay at home and care for the family and men's role is to work outside the home").

1988) (compilation of Yale Bush Center survey results). The Yale Bush Center survey found that before passage of the FMLA, parental leave policies in the states, where they existed, overwhelmingly restricted the availability of leave to female employees. *See* Kathleen Makuen, "Public Servants, Private Parents: Parental Leave Policies in the Public Sector," in *The Parental Leave Crisis* 202-03. According to this 1985 state survey, 30 states reported offering some form of infant care leave to state employees, but nearly two-thirds of these states (19), including Nevada, reported restricting such leave to female employees. *Id.* The study thus documents discrimination on the basis of sex in state leave policies.

Seven of the states that restricted parental leave to female employees also refused to provide job protection during some or all of the leave period. *Id.* By refusing to guarantee female leave-takers a job upon return, these states further undermined women's position in the workplace. Lack of job protection for women after maternity leave was one form of sex discrimination targeted by the FMLA.

In addition to evidence of discriminatory leave policies in the public sector, the legislative history incorporates several private sector studies that document extensive sex discrimination in employer leave policies. *See, e.g., 1986 Hearings* at 151-228 (reproducing Catalyst, *Report on a National Study of Parental Leaves* (1986);[4] S. Rep. No. 103-3, at 14-15 (1993) (1989 Bureau of Labor Statistics survey found that 37% of large employers offered maternity leave while only 18% offered paternity leave); 138 Cong. Rec. S12,096 (1992) (1990 Bureau of Labor Statistics study found same). While Congress did not rely

[4] The Catalyst Report was cited favorably throughout the legislative record. *See, e.g., 1986 Hearings* at 101 n.2; H.R. Rep. No. 100-511(II) at 24 (1988); H.R. Rep. No. 103-8(I), at 28.

exclusively on private sector evidence, it was aware that private sector leave policies reflect the same problems as those in the public sector, as the legislative record reflects. *See, e.g., 1986 Hearings* at 30 (statement of Meryl Frank, Yale Bush Center) ("public sector leaves don't vary much from private sector leaves"); *id.* at 147 (statement of Washington Council of Lawyers) (referencing discriminatory treatment in both public and private sector leave policies).

The Ninth Circuit correctly determined, after reviewing evidence of sex discrimination in public and private policies and evidence that these policies are substantially similar—all recorded in the legislative history—that "[t]aken together [these studies] constitute substantial evidence of unconstitutional state-sponsored gender discrimination in leave policies for state employees." *Hibbs*, 273 F.3d at 859.

Equally important, state laws themselves—which Congress examined in the legislative record, *see, e.g.*, H.R. Rep. No. 103-8(I), at 32-33, 74-84—confirm that states discriminated based on sex in their family leave laws by explicitly restricting leave to women or by defining family leave in relation to pregnancy and related disabilities so as effectively to restrict leave to women.[5] As of 1993, nine states and Puerto Rico offered "family leave" to female employees only, restricting such leave to pregnancy, disabilities related to pregnancy, and maternity leave. *See* Women's Bureau, U.S. Dep't of Labor, *State Maternity/Family Leave Law* (1993). These statutes were

[5] Ohio required employers to provide leave for "childbearing" for "a reasonable amount of time." Ohio Admin. Code § 4112-5-02(G)(6) (1989). Iowa provided leave for "pregnancy, childbirth, or related medical conditions" for women only. Iowa Code § 216:6:2 (1993). Montana made it unlawful for an employer to "refuse to grant the employee a reasonable leave of absence for . . . pregnancy." Mont. Code Ann. § 49-2-310, 311 (1987).

narrowly drafted so that only female employees would be eligible for leave. For instance, the Massachusetts statute was captioned "Entitlement of female employees; rights and benefits," and provided for reinstatement of a "female employee" absent for up to eight weeks of "maternity leave." Mass. Gen. Laws ch. 149, § 105D (1993).[6] The analogous Tennessee law was simply entitled "Maternity leave" and provided for leave "for a period not to exceed four (4) months for pregnancy, childbirth, and nursing the infant, where applicable (such period to be hereinafter referred to as 'maternity leave')." Tenn. Code. Ann. § 4-21-408 (1993). As originally passed, the Tennessee statute provided female employees with leave "for the purpose of bonding" with a new child, but did not permit fathers leave to "bond." *See* Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed*, 77 Cal. L. Rev. 171, 176-77 (1989). After the act's passage, the Tennessee attorney general's office issued an opinion suggesting that it might violate the equal protection clause. Rather than expand the statute to include fathers, the Tennessee legislature simply manufactured a different purpose—"for pregnancy, childbirth, and nursing the infant, where applicable"—to achieve the same result. *Id.*

In addition to statewide laws, discriminatory leave policies were also implemented by individual state agencies. For instance, prior to the FMLA, a number of state universities had discriminatory policies that provided infant care leave to female employees only or otherwise unlawfully

[6] *See also The Family Medical Leave Act of 1991: Hearings on S. 5 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor & Human Res.*, 102d Cong., 1st Sess. 34 (1991) (remarks of Dr. T. Berry Brazelton) (recounting how Massachusetts parental leave bill was modified and limited to maternal leave only); *id.* (remarks of Sen. Dodd) (responding by referencing evolving notions of fathers' role in family care).

differentiated between men and women.[7] State employers' collective bargaining agreements similarly restricted parenting leave to women only. *See Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. On Labor & Human Res.*, 100th Cong., 1st Sess., 385 (1987) (testimony of Gerald McEntee).

State family leave policies that provide leave only to women amount to "widespread *intentional* gender discrimination by the states." *Hibbs*, 273 F.3d at 859.[8] Such state laws rely on and reinforce the gender-role stereotypes of women as caregivers and men as breadwinners. This Court has found that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v. Orr*, 440 U.S. 268, 283 (1979). The FMLA is intended to ensure that there is no discrimination based on assumptions of the "proper place" of men and women.

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[7] From 1971-88, the University of Colorado provided up to two semesters of maternity leave unrelated to pregnancy disability to female faculty members only. Indiana State University, the University of Maryland, and the University of New Orleans also permitted only female employees to take infant care leave unrelated to pregnancy disability. The University of Minnesota's parental leave policy in the early 1990s provided six weeks leave to both women and men, but paid women for all six weeks and men for only four. *See* State university policies (on file with Amer. Ass'n of Univ. Professors).

[8] Local provisions have likewise been struck down. *See, e.g., Schafer v. Board of Pub. Educ.*, 903 F.2d 243, 248 (3d Cir. 1990) (provision granting childrearing leave unrelated to physical disability to mothers but not fathers violates Title VII); *Chavkin v. Santaella*, 81 A.D.2d 153, 157-58 (N.Y. App. Div. 1981) (city department permitted only female employees to use sick leave to extend infant care leave regardless of physical disability).

B. States Applied Discretionary Leave Policies Differently For Women And Men

Before passage of the FMLA and state laws based thereon, state leave policies were more often than not discretionary and applied in a discriminatory manner based on traditional gender-role stereotypes even in instances where the laws themselves were facially neutral. Of the 30 states in the Yale Bush Center survey that reported offering parental leave, "[i]n nearly all cases, extended leave was granted at the discretion of the supervisor." Makuen at 200. Congress recognized, and studies confirm, that where parental leave is granted at the discretion of the employer, whether in the public or private sector, male employees are less likely to be granted leave than their female counterparts. *See, e.g.*, H.R. Rep. No. 103-8(II), at 11 (citing study of federal civil service finding that supervisory discretion to grant leave results in "differences between how men and women are treated"). This finding was consistently reported to Congress in family leave act hearings. *See, e.g., 1986 Hearings* at 147 (statement of Washington Council of Lawyers) ("Parental leave for fathers . . . is rare . . . . Where child-care leave policies do exist, men, both in the public and private sectors, receive notoriously discriminatory treatment in their requests for such leave.").[9]

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[9] *See also 1987 Hearings* at 536 (statement of Professor Susan Deller Ross) ("[T]here are a number of studies . . . in which it's shown that employers in this country that are giving family leaves to their workers are not giving it non-discriminatorily, they are, by and large, giving it only to women, not to men. It's fairly flagrant discrimination."); Martin H. Malin, *Fathers and Parental Leave*, 72 Tex. L. Rev. 1047, 1078 (1994) ("Catalyst found that sixty-three percent of large employers considered it unreasonable for a man to take any parental leave, and another seventeen percent considered parental leave reasonable only if limited to two weeks or less. Even among large employers providing parental leave, an amazing forty-one percent considered it unreasonable for a man to actually use it.");

Case law confirms that state employers applied discretionary leave policies in a discriminatory fashion. In *Knussman v. State of Maryland*, 272 F.3d 625 (4th Cir. 2001), for instance, a Maryland state police officer and new father challenged the application of a facially neutral state statute that "permitted 'primary care givers' to 'use, without certification of illness or disability, up to 30 days of accrued sick leave to care for [a] child . . . immediately following . . . the birth of the employee's child.' " *Id.* at 628 (quoting Md. Code Ann., State Pers. & Pens. § 7-508(a)(1) (1994)). Plaintiff's request for "primary care giver" status was denied by a state supervisor who informed plaintiff that his wife would have to be "in a coma or dead" for him to qualify as the primary care giver under the statute. *Id.* at 629-30 (internal quotations omitted). The Fourth Circuit held that the state actor "applied a facially neutral statute unequally solely on the basis of a gender stereotype in violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 634-35. The state actor's decision, the court found, "was a by-product of traditional ideas about a woman's role in rearing a child." *Id.* at 639.

In addition to restricting family leave to women, state employers acting in a discretionary fashion have applied sex role stereotypes to deny women employment opportunities. For instance, one state employer refused to consider a female employee for a promotion because of the employer's belief that the employee should stay at home to care for her family. *Moore v. Alabama State Univ.*, 980 F. Supp. 426 (M.D. Ala. 1997). The district court concluded that the state official had unlawfully discriminated, based on evidence that he told the plaintiff "that he could not promote her because she was pregnant" and "that she could not be considered for the promotion because she was a married mother." *Id.* at 434. When leave is discretionary and therefore *de facto* limited to women, employers, including states, are also likely to discriminate against women because they have taken or are likely to take leave. *See Arkin v. Oregon*, No. 6:96CV6327 (D. Or., filed Dec. 19, 1996) (female allegedly denied tenure at state university because she had taken maternity leave); *Garrett*, 193 F.3d at 1229 (Cook, J., dissenting in part) ("Congress also found that women experienced discrimination . . . in that employers' perceptions that women served as caretakers and therefore were more likely to ask for leave time contributed to a decreased willingness to hire women in the first instance or promote them.").

Garrett v. Board of Trustees, 193 F.3d 1214, 1229 (11th Cir. 1999) (Cook, J., dissenting in part) ("Congress found that, due to societal perceptions regarding family roles, employers who offered leave time to women discriminated against men with regard to that employment benefit, either by not offering it, granting a shorter amount than was made available to women, or discouraging men from taking it."), *rev'd on other grounds*, 531 U.S. 356 (2001).

The FMLA places the decision as to whether to take family leave in the hands of the employee, and takes discretionary decisionmaking out of the hands of the state (or private) employer, thereby eliminating the risk of discriminatory treatment based on sex.

C. States Provided No Family Leave

1. States Had Not Enacted Family Leave Policies Before Introduction of the FMLA

Petitioner argues that the FMLA cannot be justified as a remedy for unconstitutional sex discrimination because at the time the FMLA was passed, most states provided employees with a remedy in the form of state family leave laws. Pet. Br. at 4, 24, 32. Petitioner's argument is belied by the facts and by the FMLA's legislative history. *See, e.g.*, H.R. Rep. No. 103-8(I), at 78 ("The debate on family and medical leave suggests that many States have already passed such leave benefits as are contained in H.R. 2. Yet that is not the case."). When family leave leg-

islation was initially proposed in Congress in 1985, not a single state had a family leave law on its books enabling employees to care for sick family members. That is the environment in which Congress first considered the FMLA. Congress heard testimony that the absence of leave policies leads to sex discrimination in employment. *See, e.g., 1987 Hearings* at 172 ("lack of uniform parental and medical leave policies in the work place has created an environment where discrimination is rampant").[10] Numerous commentators agree.[11]

Far from being leaders in the area of family leave legislation as the revisionist history of Petitioner and *Amici* Alabama *et al.* suggests, every state that has passed a family leave law has done so with awareness of and in response to federal legislative activity. This fact is confirmed by the timing and substance of state leave laws, as well as by the congressional record. *Amici* Alabama *et al.* concede that state family leave laws were "essentially modified versions of the FMLA legislation pending in

[10] Congress also recognized that failure to afford family leave negatively affects women's position in the workplace because "the primary responsibility for family caretaking often falls on women." 29 U.S.C. § 2601(a)(5) (noting that "such responsibility affects the working lives of women more than it affects the working lives of men"); S. Rep. No. 102-68, at 28 (1991) (absence of family leave has "adverse impact on women's earnings"). While the Constitution may not prohibit state conduct that has a disparate impact on women, intentional state actions in the form of unconstitutionally discriminatory laws perpetuated women's roles as family caretakers. *See* Part III, *infra*.

[11] *See, e.g.*, Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Reform 372 (2001); Donna R. Lenhoff & Sylvia M. Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 Harv. J. on Legis. 403, 405-06 (1989); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1132 (1986).

Congress" or "targeted one or another of the leave issues addressed in the FMLA." Br. of *Amici* Alabama *et al.* at 11. In the FMLA's legislative history, Congress likewise noted that federal legislative efforts were the catalyst for state proposals, observing that "[s]ince Federal family leave legislation was first introduced, numerous States *have begun to consider* similar family leave initiatives." *See* S. Rep. No. 103-3, at 20-21 (emphasis added).[12]

The introduction of the Parental and Disability Leave Act of 1985, *supra*, and a similar bill in 1986, H.R. 4300, 100th Cong. (1986), preceded the initiation of legislative activity in the states. In fact, not a single state had passed a bill providing for leave to care for ill family members before 1987, after federal leave legislation had twice been introduced. *See, e.g.*, Steven K. Wisensale & Michael D. Allison, *An Analysis of 1987 State Family Leave Legislation: Implications for Caregivers of the Elderly*, 28 The Gerontologist 779, 780 (Dec. 1988); Ira B. Sprotzer, *Parental and Family Leave Laws: A Review and Analysis*, *in* 15-4 Employee Benefits J. 12 (Dec. 1990); *Family Leave Activity Shifts to the States*, 11-10 Employee Benefit Notes 1-3 (Oct. 1990); *see generally* Appendix B (summary of pre-FMLA state family leave laws). By 1987, only a handful of states enacted leave laws, and these laws were limited in scope compared to the FMLA. Only Connecticut had a statute permitting leave to care

[12] *See also* H.R. Rep. No. 103-8(I), at 32-33; *1987 Hearings at* 390 ("[I]t is important for the federal government again to take the lead on . . . family leave [because] States tend to follow the lead . . . of the federal government, and if this example is held up by the federal government and standards are set, then I really think Kentucky, as other states, will fall in line and adopt parental leave policies.") (remarks of Debra Spotts Merchant); *id.* at 339 ("[O]ne of the things that I have seen historically take place is that when a statute or when a law emanates from the federal level that states generally follow suit, . . . once it is initiated at the federal level it will trickle down.") (remarks of Martin Luther King, III).

for ill family members other than children, *id.*, making it the only state with a statute covering the leave available under FMLA § 2612(a)(1)(C).

At the time the FMLA was passed in 1993, 22 states, including Nevada, had not enacted any form of parental or family leave legislation. *See* Appendix B; State Maternity/Family Leave Law; H.R. Rep. No. 103-8(I), at 32-33. In states that had passed some form of family leave law by 1993, the scope of the laws varied widely, and many fell short of the protections provided by the FMLA. Seven states, in their family leave and maternity disability laws, granted leave to *female employees only*, either explicitly or effectively, for birth and adoption. Nearly half of these laws failed to extend leave to care for sick family members, as provided in FMLA § 2612(a)(1)(C). Eleven of these laws covered only leave for births or adoptions. At the time Congress passed the FMLA, then, only one-third of the states had enacted non-discriminatory family leave laws approaching the scope of the FMLA.

2. State Sick Leave Policies Did Not Provide FMLA-Equivalent Family Leave

Contrary to the argument advanced by *Amici* Alabama *et al.*, states that permitted employees to use sick leave to care for ill family members still could not be said to have had "family leave" policies in place prior to the introduction of the FMLA. Sick leave policies were not designed to, nor did they, offer the range of benefits provided for in the FMLA. These policies fell short of the FMLA in several respects.

First, the availability of sick leave was almost always at the discretion of the supervisor. In some instances, supervisory discretion was written into the policy. For instance, the use of sick leave was permitted in Georgia and Nevada only with a supervisor's approval. *See* Michele Lord & Margaret King, *The State Reference Guide to Work-Family Programs for State Employees* 107, 115 (1991). In other cases, supervisory discretion resulted from the intentionally vague language of the operative provision. *Id.* at 33 ("By leaving the language vague, the actual interpretations and decision-making responsibility for allowing the use of sick leave in family situations lies with [supervisors]. Supervisors' sensitivity to the needs of employees will ultimately determine the use and helpfulness of these sick leave coverage policies."). One of the primary purposes of the FMLA is to avoid such discretionary decision-making concerning family leave, which often results in discriminatory treatment based on sex.

Even after the introduction of the FMLA, a number of states did not permit their employees to use sick leave to care for ill family members. As of 1990, seven states restricted the use of sick leave to employee illness only, *id.* at 31-32, and none of these states had enacted family leave laws between 1987 and 1990. As a result, as of 1990, employees of these seven states did not have any type of leave available to tend to ill family members.

Among those states that permitted employees to use sick leave to care for ill family members, the scope of coverage varied widely based on the definition of family member. *Id.* at 32. As of 1990, the majority of such states (25) limited the use of sick leave to care for "dependents," defined as children or by the state's tax code. *Id.* One state permitted the use of sick leave only to care for the employee's "household members" or those for whom the employee had "custodial responsibility." *Id.* at 32, 104-25. Another four states restricted the use of sick leave to care for "immediate family members." *Id.* Nine states simply used the term "family member" to define the scope of coverage, thereby requiring supervisors and others to interpret the precise scope. *Id.* As of 1990, then, employees of fewer than half the states could use their sick leave to care for ill family members other than children, and in

many cases access to leave depended on a supervisor's interpretation of state policy.

Almost half of the states explicitly imposed short time restrictions on the use of sick leave to care for ill family members. *Id.* (from 2 to 24 days, but most under 5 days). Some states limited the number of sick days or hours per year an employee could use to tend to ill family members. For instance, state employees were eligible to take only 4 days per year in Arizona and Pennsylvania, and 40 hours per year in Iowa, North Dakota, and West Virginia. *Id.* at 105, 117, 119, 123. Other states limited the number of sick days on a per occurrence basis, such as California and Washington, where employees could take only 5 days per illness. *Id.* at 105, 119. The FMLA, on the other hand, makes available up to twelve weeks of leave in the event of a serious illness in the family.

III. A LONG HISTORY OF UNCONSTITUTIONAL STATE-SPONSORED SEX DISCRIMINATION ENFORCED SEX ROLE STEREOTYPES

In addition to discriminatory leave policies, various forms of unconstitutional state laws—including mandatory maternity leave laws, protective wage and hour laws, discriminatory death and incapacity benefit laws, unemployment insurance laws, and jury eligibility laws—have reinforced sex role divisions and have thus created the need for the FMLA. These forms of blatant state-sponsored sex discrimination have been overturned by court after court, but the limitations they created and perpetuated have had lasting effects, confining women to the role of family caretakers and hindering men from sharing family care responsibilities. Discriminatory state laws accomplished this result not only by reinforcing stereotypes but also by excluding women outright from certain forms of employment; requiring certain women to play the role of family caretakers; making it more expensive or difficult

for employers to hire women than men; and creating incentives for women to undertake, and for men to abstain from, family caretaking. These state laws *required* state, local government, and private entities to discriminate based on sex and have had a lasting impact on economic realities and on attitudes about who should be at home and at the workplace—both of which are redressed by the FMLA.

This Court has long condemned discriminatory state laws as unconstitutional and acknowledged that they perpetuate gender role stereotypes. *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982); *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *Frontiero*, 411 U.S. at 684. Just as limiting admissions to state-supported nursing schools based on the "old view that women, not men, should become nurses" makes that assumption "a self-fulfilling prophecy," *Hogan*, 458 U.S. at 730, so do state laws based on the old assumption that women should be caretakers perpetuate that reality. By enabling both men and women to balance work and family care, the FMLA remedies some of the damage created by these discriminatory state laws which "serve[d] to ratify and perpetuate invidious, archaic, and overbroad stereotypes," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994), about the roles of women and men.

A. States Excluded Women From Jobs, Assuming that Women Should Be Family Caretakers

Throughout the 19th and 20th centuries, states used a variety of discriminatory laws to limit the professions in which women could work. States prohibited women's employment in law, mining, jobs involving moving machinery, establishments serving alcohol,[13] and other

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[13] *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464 (1948) (Michigan law); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971).

jobs.[14] *See generally* 3 Lex K. Larson, Employment Discrimination § 44.01 (2d ed. 2002); Edith L. Fisch & Mortimer D. Schwartz, *State Laws on the Employment of Women* 21-22 (1953). States kept a number of these prohibitions in effect until recently. For instance, as of 1970, ten states still forbade women from working in establishments serving alcohol; Alaska, Ohio and Pennsylvania retained these prohibitions as late as 1980. 3 Larson § 44.01 n.24. Also as of 1970, fourteen states still prohibited women from working in mines. Those laws remained enforceable in four states as of 1980, *id.* § 44.01 n.29, and Arkansas' law is still on the books. Ark. Code Ann. § 11-7-318 (Michie 2001).

While state laws barring women from certain occupations persisted until recently, they were based on centuries-old stereotypes about the role of women, including the assumption that women should be in the home caring for their families rather than at work. *See, e.g., Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring) (upholding Illinois law excluding women from practice of law because "the domestic sphere" is "that which properly belongs to the domain and functions of womanhood"); *In re Goodell*, 39 Wis. 232 (1875) (justifying women's exclusion from practice of law because "[t]he law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world"). The states' conviction that women's place was in the home was so entrenched that in the 1930s, Massachusetts even attempted to pass a law to exclude or remove all married women from public service. *In re Opinion of the Justices*, 22 N.E.2d 49 (Mass. 1939) (finding proposed bills unconstitutional, though not because they discriminated on the basis of sex). Thus, female state employees were not immune from the stereotypes that limited women's employment generally.[15]

[14] *See, e.g., Ridinger v. Gen'l Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971) (Ohio law prohibiting women from working as section hands, crossing watchmen, express drivers, and metal moulders), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972).

State laws excluding women from certain occupations obviously limit women's employment opportunities and are plainly unconstitutional. This Court has long recognized that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975). But the attitudes fostered by these discriminatory state laws continue to affect behavior; indeed, these attitudes also underlay state discrimination in family leave.

B. States Enacted Discriminatory Protective Laws Limiting Women's Employment Opportunities and Confining Them to the Role of Caretakers

Until less than thirty years ago, state laws further limited women's employment opportunities by imposing a variety of restrictions on the employment of women but not men. States regulated the hours and times women could work, imposing maximum hour and overtime restrictions not applicable to men;[16] the wages women could earn, imposing minimum wage requirements not

[15] States also unconstitutionally restricted women's employment prospects by excluding them from institutions of higher learning. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993); *Kirstein v. Rector & Visitors of Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970).

[16] *See, e.g., Radice v. New York*, 264 U.S. 292 (1924); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Commonwealth of Mass.*, 232 U.S. 671 (1914); *Kane v. Egan*, 14 Conn. Supp. 485 (1947); *Ass'n Indus. of Okla. v. Indus. Welfare Comm'n*, 90 P.2d 899 (Okla. 1939); *State v. Ehr*, 221 N.W. 883 (N.D. 1928); *State v. Collins*, 198 N.W. 557 (S.D. 1924); *State v. Dominion Hotel*, 151 P. 958 (Ariz. 1915), *aff'd*, 249 U.S. 265 (1919); *State v. Charles Schweinler Press*, 108

applicable to men;[17] the weights women could lift, imposing limits not applicable to men;[18] and mandated days of rest, meal and rest periods, and seating facilities not required for men. *See generally* 3 Larson § 44.01.

These discriminatory state laws were extremely common and remained in effect well into the 1970s. The law reporters teem with 1970s cases invalidating protective laws for women under Title VII.[19] In 1975, four states and Puerto Rico still prohibited or regulated night work by women; eight states still mandated meal periods for women; and five states still mandated rest periods for women. *See* Women's Bureau, U.S. Dep't of Labor, Bulletin 297, *1975 Handbook On Women Workers*, at 338-39 (1975) (hereinafter "*1975 Handbook*"). At that time, fif-

N.E. 639 (N.Y. 1915); *Stettler v. O'Hara*, 139 P. 743 (Ore. 1914), *aff'd*, 243 U.S. 629 (1917); *W. C. Ritchie & Co. v. Wayman*, 91 N.E. 695 (Ill. 1910).

[17] *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *New Jersey Rest. Ass'n v. Holderman*, 131 A.2d 773 (N.J. 1957); *Vissering Mercantile Co. v. Annunzio*, 115 N.E.2d 306 (Ill. 1953); *Young v. Willis*, 203 S.W.2d 5 (Ky. 1947); *Strain v. Southerton*, 62 N.E.2d 633 (Ohio App. 1945); *McGrew v. Indus. Comm'n*, 85 P.2d 608 (Utah 1938); *Larsen v. Rice*, 171 P. 1037 (Wash. 1918); *see generally Topeka Laundry Co. v. Court of Indus. Relns.*, 237 P. 1041, 1046 (Kan. 1925) (listing statutes).

[18] *See, e.g., Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Manning v. Gen'l Motors Corp.*, 1971 U.S. Dist. LEXIS 12108 (N.D. Ohio 1971) (collecting cases), *aff'd*, 466 F.2d 812 (6th Cir. 1972).

[19] *See, e.g., Stryker v. Register Publ'g Co.*, 423 F. Supp. 476 (D. Conn. 1976); *Homemakers, Inc. v. Div. of Indus. Welfare*, 509 F.2d 20 (9th Cir. 1974); *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972); *Garneau v. Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971); *Kober v. Westinghouse Elec. Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd*, 480 F.2d 240 (3d Cir. 1973); *Local 246 v. Southern Cal. Edison Co.*, 320 F. Supp. 1262 (C.D. Cal. 1970).

teen states still had maximum hours laws for women. *Id.* New Hampshire's night work law was not repealed until 1989, and Pennsylvania's until 1988. 3 Larson § 44.01 n.11. In 1964, 40 states regulated women's hours in one or more industries. *1975 Handbook* at 329. Similarly, as of 1970, 41 states still limited work for women in one or more industries; 45 states still required "appropriate seating" for women in certain jobs; and ten states and Puerto Rico still imposed weight-lifting restrictions applicable only to women. 3 Larson § 44.01. In 1953, 23 states had women-only minimum wage laws in effect. Fisch & Schwartz 24. Those laws were still enforced in Colorado, Utah and Wisconsin in 1975. *1975 Handbook* at 316.

These state protective laws were based in large part on the old stereotype that women's participation in the workforce was secondary to their role as family caretakers. For example, in upholding a women's hours law, the Supreme Court of California said that women had "household or other domestic duties" that would occupy their time. *Ex Parte Miller*, 124 P. 427, 429 (Cal. 1912), *aff'd*, 236 U.S. 373 (1915). As the Court explained almost a century ago, there was "a widespread belief" that protective legislation was justified based in large part on women's "maternal functions," "the rearing and education of the children," and "the maintenance of the home." *Muller v. Oregon*, 208 U.S. 412, 419-20 (1908). Countless state courts relied on similar discriminatory reasoning to uphold laws imposing restrictions on women's employment.[20]

[20] *See, e.g., State v. Ehr*, 221 N.W. 883, 884 (N.D. 1928); *State v. Charles Schweinler Press*, 108 N.E. 639, 640 (N.Y. 1915); *State v. Elerding*, 98 N.E. 982, 984 (Ill. 1912); *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695, 697 (Ill. 1910); *State v. Williams*, 51 Misc. 383, 389 (N.Y. City Ct.), *aff'd*, 116 A.D. 379 (N.Y. Sup. Ct. 1906), *aff'd*, 81 N.E. 778 (N.Y. 1907); *Wenham v. State*, 91 N.W. 421 (Neb. 1902) (upholding women's hours law to ensure women's ability to "bear[ ] their share of the burdens of the family and the home"); *State v. Buchanan*, 70 P. 52, 54 (Wash. 1902); *see generally* Judith A. Baer,

These discriminatory state laws made the sex role stereotypes on which they were based self-enforcing. This Court has recognized, for example, that "prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work." *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). Similarly, maximum hour laws may cause "an employer [to] refuse to hire a potential employee, solely because of her sex, if, for example, he requires his employees to work longer hours or periods than are specified in" the law. *Jones Metal Prods. Co. v. Walker*, 281 N.E.2d 1, 6 (Ohio 1972). These laws limited women's employment opportunities and caused employers to view them as less desirable employees.[21] As courts have recognized, protective laws also had an adverse effect on women's wages[22] and prevented women from receiving promotions.[23] "By denying that women were

The Chains of Protection: The Judicial Response to Women's Labor Legislation 23-29 (1978).

21 *See, e.g., Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (employer refused to hire woman based on California women's hours and weight lifting laws); *State v. Fairfield Cmtys. Land Co.*, 538 S.W.2d 698 (Ark. 1976) (because of limitations on the overtime women were allowed to work in Arkansas, "[i]t is fair to assume that an employer might therefore decide to hire a man rather than a woman, both being qualified"); 3 Larson § 44.01 n.34 (citing 1967 survey of 78 companies that "showed that state protective legislation was the reason in 18 percent of the instances in which females were rejected for employment").

22 *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 191-94 (1974) (situation in which state laws restricting women's night work had continuing effect on women's wages after repealed).

23 *See, e.g., Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304, 1306 (S.D. Ill. 1970) ("[f]emale employees . . . [we]re not receiving their share of overtime hours and [we]re not receiving assignments or promotions to jobs normally requiring the performance

full-fledged, equal wage earners, [protective] legislation institutionalized social reproduction as women's primary role." Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* 212 (1982). Conversely, these laws also cemented men's role in the workplace rather than the home, by, for example, "impos[ing] primarily upon the male employees the burdens of [certain forms of] work." *Caterpillar Tractor*, 317 F. Supp. at 1306. These laws thus made it more difficult for men to share the burdens of family care. In short, for over two centuries, states enacted and enforced laws that are plainly unconstitutional under current standards and perpetuated the stereotype that women are primarily family caretakers and men primarily breadwinners.

C. States Enacted Other Discriminatory Laws That Reinforced Gender-Role Stereotypes and Encouraged Women to Remain Family Caretakers

1. Benefits for Male Workers Only

Until the 1980s, state laws continued to discriminate against women workers on the assumption that their employment was secondary. For example, state laws providing that widows, but not widowers, would automatically receive workers' compensation or other benefits at the death of a spouse unconstitutionally presumed that women were dependent on their husbands' incomes. Most of these statutes were not struck down until the 1980s,[24] even though for several decades prior, "more often than

of work for overtime hours in excess of those permitted by" Illinois law); *see also* 3 Larson § 44.01 (state protective laws "tended to ban women from a disproportionate number of these more lucrative jobs").

24 *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (Missouri law); *Portman v. Steveco, Inc.*, 453 N.E.2d 284 (Ind. Ct. App. 1983); *Swafford v. Tyson Foods, Inc.*, 621 S.W.2d 862 (Ark. App. 1981); *Hess v. Wims*, 613 S.W.2d 85 (Ark. 1981).

not a family's standard of living depend[ed] upon the financial contributions of both marital partners." *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal. 3d 395, 405 (Cal. 1977) (internal citations omitted).

Based on archaic assumptions of "female economic disablement," *Tomarchio v. Greenwich Township*, 379 A.2d 848, 853 (N.J. 1977), these laws were justified on the grounds that it was more efficient to presume dependency in the case of women but not men.[25] As a result, female employees received fewer benefits than males, making it more economically rational for men to become the primary breadwinners in the family.[26] This Court has recognized that "this kind of discrimination against working women" is unconstitutional and perpetuates the stereotype that men are the primary breadwinners in the family. *Wengler*, 446 U.S. at 148; *see also Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

2. Presumption in Unemployment Insurance Law that Women are Caretakers

Until recently, states enacted and enforced unemployment compensation laws that discriminated against women by automatically presuming that pregnant women or women who had recently given birth could not work.[27] Notably,

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[25] *See, e.g., Arp*, 19 Cal. 3d at 404 (noting that "widow's conclusive presumption of total dependency has survived essentially unchanged since the enactment of the first detailed set of workers' compensation statutes").

[26] In other words, state laws also hindered men from becoming family caretakers. Another way in which state laws accomplished this is through presumptions that unwed fathers are unfit to raise their children. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972) (Illinois law).

[27] *See, e.g., Turner v. Dep't of Empl. Sec.*, 423 U.S. 44 (1975) (per curiam) (Utah law making pregnant women ineligible for unemployment benefits for 12 weeks before and 6 weeks after child birth);

many of these statutes assumed that women were unable to work for a period of time after childbirth, presumably because they had to care for their children. For example, based on an assumption that women were unable or unwilling to work for an indefinite period after childbirth, a Colorado statute made women ineligible for unemployment insurance after the conclusion of their pregnancies unless, after giving birth, they spent thirteen weeks in full-time employment. *See Sylvara v. Indus. Comm'n*, 550 P.2d 868, 869 (Colo. 1976) (finding statute unconstitutional).

Based on those assumptions, women were routinely held ineligible for unemployment benefits when they were willing and able to work despite the fact that similarly situated men were eligible. These laws thus created economic incentives for women and not men to undertake family care responsibilities because in the event the primary breadwinner lost his or her job, only the man could receive unemployment benefits. This Court has repeatedly criticized state laws based on a preference for "an allocation of family responsibilities under which the wife plays a dependent role," *Orr*, 440 U.S. at 279 n.9, and has held unconstitutional conclusive presumptions of women's

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UAW v. Johnson, 674 F.2d 1195 (7th Cir. 1982) (Indiana statute presuming women are unable to work 13 weeks before and 4 weeks after child birth); *Gonzales v. Texas Empl. Comm'n*, 486 F. Supp. 278 (S.D. Tex. 1977) (Texas policy denying benefits to women in last trimester of pregnancy and for 6 weeks after delivery), *aff'd*, 614 F.2d 1295 (5th Cir. 1980); *Conn. Nat'l Org. for Women v. Peraro*, No. N77-477, 1980 WL 212, at *1 (D. Conn. Apr. 8, 1980) (consent decree forbidding state agencies from declaring, *inter alia*, women with young children not yet in childcare as unable to work); Utah Code Ann. § 35-4-5(h)(1) (1974) (amended 1976) (women disqualified from unemployment benefits during 18-week period before and after childbirth); *cf. Boren v. Dep't of Empl. Dev.*, 59 Cal. App. 3d 250 (1976) (law denying unemployment compensation to workers who left their job for "domestic reasons").

inability to work before and after pregnancy. *Turner*, 423 U.S. 44 (1975).

3. Mandatory Maternity Leave for Women Only

State laws also kept women out of the workplace and in the home by requiring women to take maternity leave during and after pregnancy, often without job security. As of 1953, Connecticut, Massachusetts, Missouri, New York, and Vermont had statutes outright prohibiting the employment of women before and after childbirth. Fisch & Schwartz 22. Vermont's law was not repealed until 1969, and Massachusetts' until 1974. Vt. Stat. Ann. tit. 21, § 444 (1947) (repealed 1969); Mass. Gen. Laws ch. 345 (1911) (repealed 1974). To this day, New York has a mandatory maternity leave law on the books. N.Y. Lab. Law § 206-b (McKinney 1973) (forbidding employment of women in factories or mercantile establishments within four weeks of childbearing). In addition to state mandatory maternity leave laws, state agencies had mandatory maternity leave policies for their female employees. *See, e.g., Schattman v. Texas Empl. Comm'n*, 459 F.2d 32, 40-41 (5th Cir. 1972) (upholding mandatory maternity leave policy of Texas state agency and noting that other Texas agencies have similar policies).

This Court has held unconstitutional mandatory maternity leave policies similar to those adopted by the states. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). Not only do such policies limit the workforce participation, including in state employment, of childbearing women, but they also make all women vulnerable to workplace discrimination. Congress recognized that "the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace." S. Rep. No. 331, at 3 (1977).

4. Jury Service for Men Only

Until recently, state laws systematically excluded or exempted women from jury service largely because of an assumption that women had to care for their families. In 1961, less than half of the states considered women for jury selection on the same basis as men. *See Hoyt v. Florida*, 368 U.S. 57, 63 & nn.5-8 (1961) (listing state statutes); *see generally J.E.B.*, 511 U.S. at 131-34 (discussing history of women's exclusion from jury service). Many of these state laws explicitly exempted women but not men who had to care for sick family members. For example, Connecticut's jury service statute excused any woman who was "nursing a sick member of her family, or who has care of one or more children under the age of sixteen years." Conn. Gen. Stat. § 51-218 (1953) (repealed 1975). Similar provisions existed in other states.[28] As late as 1980, 21 states still exempted women but not men for family responsibilities, *see* Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 Stan. L. Rev. 1115, 1138 (1994), despite the fact that this Court held that such laws violate the Sixth Amendment in *Taylor v. Louisiana*, 419 U.S. 522 (1975).

The states' discriminatory jury service laws were based in large part on the belief that women were "the center of home and family life" and therefore had "special responsibilities." *Hoyt*, 368 U.S. at 61-62. Numerous state courts relied on similar stereotypes to uphold such laws. For instance, the Virginia Supreme Court found that the state

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[28] *See, e.g.*, Fla. Stat. ch. 40.01(1) (1967) (amended 1979) (exempting mothers with children under 18); Mass. Gen. Laws ch. 234 § 1 (1949) (amended 1973) (exempting mothers of and women with custody of children under 16); N.C. Gen. Stat. § 9-19 (1951) (repealed 1967) (exempting women who care for children under 12 or ill family members); Tex. Rev. Civ. Stat. Ann. art. 2135 (1964) (repealed 1985) (excluding women with custody of children under 16).

had "a substantial interest in the care of children and persons with mental or physical impairments, and the statutes reflect a reasonable recognition by the legislature that women are usually the persons who perform such service." *Archer v. Mayes*, 194 S.E.2d 707, 710 (Va. 1973). The Louisiana Supreme Court upheld a law "established, obviously, to foster and encourage woman's role as mother and the mainstay of family life." *State v. Washington*, 272 So. 2d 355, 357 (La. 1973).[29]

As this Court acknowledged, stereotypes like those in the jury laws "are likely to stigmatize as well as to perpetuate historical patterns of discrimination." *J.E.B.*, 511 U.S. at 140 n.11. These state laws not only kept women from participating in an area of public life based on the assumption that women should care for their families, they also precluded men from assuming greater family caretaking responsibilities by not excusing them on the same basis. In other words, they perpetuated the notion that women should serve as family caretakers and that men need not.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully urge that this Court affirm the decision below.

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[29] *See also State v. Parker*, 462 S.W.2d 737, 740 (Mo. 1971); *Dekosenko v. Brandt*, 313 N.Y.S.2d 827, 830 (N.Y. Sup. Ct. 1970), *aff'd*, 318 N.Y.S.2d 915 (App. Div. 1971); *State v. Comeaux*, 211 So. 2d 620, 622 (La. 1968); *Scott v. State*, 207 So. 2d 493, 496 (Fla. 1968); *State v. Hall*, 187 So. 2d 861, 868 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966); *cf. Duren v. Missouri*, 439 U.S. 357 (1979).

Respectfully submitted,

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APPENDIX A

AMICI CURIAE

Alice Kessler-Harris is the R. Gordon Hoxie Professor of American History at Columbia University. Professor Kessler-Harris has written extensively on the history of women in the American labor force. Her publications include *Out to Work: A History of Wage-Earning Women in the United States* (Oxford 1982); *A Woman's Wage: Historical Meanings and Social Consequences* (Kentucky 1990); *Women Have Always Worked: A Historical Overview* (Feminist Press 1981); and most recently, *In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in the United States* (Oxford 2002), which won the Bancroft Prize and the Herbert Hoover Presidential Book Award.

Linda K. Kerber is the May Brodbeck Professor of Liberal Arts and Professor of History at the University of Iowa. Professor Kerber is a member of the American Academy of Arts and Sciences as well as the Society of American Historians, and has served as president of the Organization of American Historians (1997) and the American Studies Association (1988). She has written extensively on women's rights and women's roles in American history, and her publications include *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (Hill & Wang 1998), which was the winner of the Littleton Griswold Prize for best book in American legal history and the Joan Kelley Prize for the best book in women's history, both awarded by the American Historical Association.

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Eileen Boris is the Hull Professor of Women's Studies at the University of California–Santa Barbara. Professor Boris is the Director of the Center for Research on Women and Social Justice at the University of California, Santa Barbara and the co-principal investigator of "Women Working for Economic Justice: A Collaborative Project." Among Professor Boris's published works on the history of women in the American workplace are *Home to Work: Motherhood and the Politics of Industrial Homework in the United States*, which won the Philip Taft Prize in Labor History in 1995; "Social Citizenship and Women's Right to Work in Post-War America," in *Women's Rights and Human Rights: International Historical Perspectives* (Patricia Grimshaw, Katie Holmes & Marilyn Lake eds., Palgrave 2001) (co-written with Sonya Michel); and "The Right to Work is the Right to Live! The Rights Discourse of Fair Employment," *Two Cultures of Right: The Quest for Inclusion and Participation in Modern America and Germany* (Manifred Berg & Martin Geyser eds., German Historical Institute & Cambridge Univ. Press 2002).

Ardis Cameron is an associate professor of American and New England Studies at the University of Southern Maine. Professor Cameron is a member of the American Studies Committee on Women, a 2002 recipient of a John Simon Guggenheim Fellowship and a 2001 recipient of a National Endowment for Humanities Senior Research fellowship. Her publications include *Radicals*

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Michael C. Grossberg is a professor of History and Law at Indiana University–Bloomington. Professor Grossberg has won numerous awards for his teaching and writings in the area of American history. Among his publications are *Governing the Hearth: Law and the Family in Nineteenth Century America* (Univ. of North Carolina Press 1985) and "Giving the Present a Past? Family Law in the United States, 1950-2000," in *Cross Currents: Anglo-American Family Law, 1950-2000* (San-

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Gerda Lerner is the Robinson-Edwards Professor of History, Emerita, at the University of Wisconsin–Madison. Professor Lerner served as the President of the Organization of American Historians. She has written extensively on women's history. Her works include *The Female Experience: An American Documentary* (Bobbs-

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Susan Porter Benson is an associate professor of History at the University of Connecticut. Professor Benson is the Secretary of the Labor and Working-Class History Association. Her publications on gender issues include "Living on the Margin: Working Class Marriage and Family Survival Strategies in the U.S., 1919-1941," in *The Sex of Things: Essays on Gender and Consumption* (Victoria de Grazia, ed. with Ellen Furlough, Univ. of California Press 1996).

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Susan M. Reverby is a professor of Women's Studies at Wellesley College. Professor Reverby is a historian of American women and has written and edited extensively on the subject of women's history. In addition to prize-winning books and articles, she co-edited *America's Working Women: A Documentary History* (Random House/Vintage 1st ed. 1976).

APPENDIX B

STATE FAMILY LEAVE LAWS ENACTED PRIOR TO THE PASSAGE OF THE FMLA

STATE	AS OF 1985	AS OF 1990	AS OF 1993	DEFICIENCIES IN SCOPE OF STATE LAW COMPARED TO FMLA
ALABAMA	None	None	None	No family leave statute.
ALASKA	None	None	√	Limited to 18 weeks over two-year period for family illness. Covered state employees only.
ARIZONA	None	√	√	*No family leave statute covering illness.* Covered birth/adoption only.
ARKANSAS	None	None	None	No family leave statute.
CALIFORNIA	None	None	√	Limited to 4 months over two-year period. Employee illness not covered.

COLORADO	None	None	√	*No family leave statute covering illness.* Granted same leave for birth/adoption.
CONNECTICUT	None	√	√	Initially covered state employees only.
DELAWARE	√	√	√	*No family leave statute covering illness.* Limited to 6 weeks only for adoption. Covered state employees only.
FLORIDA	None	None	√	Employee illness not covered. Covered state employees only.
GEORGIA	None	None	√	Covered state employees only.
HAWAII	None	None	√	Limited to 4 weeks a year. Employee illness not covered. Employers with fewer than 100 employees exempt. Covered state employees only.

IDAHO	None	None	None	No family leave statute.
ILLINOIS	None	None	None	No family leave statute.
INDIANA	None	None	None	No family leave statute.
IOWA	None	None	None	No family leave statute.
KANSAS	None	None	None	No family leave statute.
KENTUCKY	√	√	√	*No family leave statute covering illness.* Limited to 6 weeks for adoption of child under 7. Job reinstatement not specified.
LOUISIANA	None	None	None	No family leave statute.
MAINE	None	√	√	As of 1988, limited to 8 weeks over two-year period. As of 1991, limited to 10 weeks over two-year period.

MARYLAND	None	None	√	Discretionary. Employee illness not covered. Covered state employees only.
MASSACHUSETTS	√	√	√	*No family leave statute covering illness.* Provides women only up to 8 weeks leave for the birth/adoption of child under 3.
MICHIGAN	None	None	None	No family leave statute.
MINNESOTA	None	√	√	*No family leave statute covering illness.* Limited to six weeks for birth/adoption.
MISSISSIPPI	None	None	None	No family leave statute.

MISSOURI	None	None	√	*No family leave statute covering illness.* Granted same leave for adoption as for birth. Covered state employees only.
MONTANA	None	None	None	No family leave statute.
NEBRASKA	None	None	None	No family leave statute.
NEVADA	None	None	None	No family leave statute.
NEW HAMPSHIRE	None	None	None	No family leave statute.
NEW JERSEY	None	√	√	Limited to 12 weeks over two-year period. Employee illness not covered.
NEW MEXICO	None	None	None	No family leave statute.

NEW YORK	None	None	√	*No family leave statute covering illness.* Granted same leave for adoption as for birth.
NORTH CAROLINA	None	None	None	No family leave statute.
NORTH DAKOTA	None	√	√	Employee illness not covered. Covered state employees only.
OHIO	None	None	None	No family leave statute.
OKLAHOMA	None	√	√	Family leave for illness restricted to critically or terminally ill child or "dependent adult." Illness of employee not covered. Covered state employees only.

OREGON	None	√	√	As of 1987, covered only birth/ adoption. As of 1992, restricted leave to the illness of a child requiring "home care" or to care for a child, parent or spouse requiring "constant care." Leave for family illness limited to 12 weeks over two-year period. Benefits stopped accruing during family leave.
PENNSYLVANIA	None	√	√	*No family leave statute covering illness.* Limited to 6 weeks for adoption. Covered state employees only.
RHODE ISLAND	None	√	√	As of 1987, limited to 13 weeks over a two-year period for birth, adoption, or care of seriously ill child only. Later expanded to cover illness of spouse, parent or employee.

SOUTH CAROLINA	None	None	None	No family leave statute.
SOUTH DAKOTA	None	None	None	No family leave statute.
TENNESSEE	None	√	√	*No family leave statute covering illness.* Limited to 30 days for adoption. Covered state employees only.
TEXAS	None	None	√	*No family leave statute covering illness.* Limited to 6 weeks for "normal child birth"/adoption. Covered state employees only.
UTAH	None	None	None	No family leave statute.
VERMONT	None	None	√	
VIRGINIA	None	None	None	No family leave statute.

WASHINGTON	None	√	√	Covered only birth, adoption or "terminal illness" of a child. Employers with fewer than 100 employees exempt.
WEST VIRGINIA	None	√	√	Employee illness not covered. Covered state employees only.
WISCONSIN	None	√	√	Limited to 6 weeks for birth/adoption. Limited to 2 weeks for family illness.
WYOMING	None	None	None	No family leave statute.

Sources: Steven K. Wisensale & Michael D. Allison, *An Analysis of 1987 State Family Leave Legislation: Implications for Caregivers of the Elderly*, 28 The Gerontologist 779 (Dec. 1988); Ira B. Sprotzer, *Parental and Family Leave Laws: A Review and Analysis, in* 15-4 Employee Benefits J. 12 (Dec. 1990); *Family Leave Activity Shifts to the States*, Employee Benefit Notes, Vol. 11-10 (Oct. 1990); Michele Lord & Margaret King, *The State Reference Guide to Work-Family Programs for State Employees* 107 (1991); Women's Bureau, U.S. Dep't of Labor, State Maternity/Family Leave Law (1993) (includes pregnancy disability and sick leave) and state statutes referenced therein.

This appendix includes only parental and family leave statutes. It does not include administrative rules, paid sick leave provisions, or maternity disability provisions.